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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY JHONATHAN RUIZ,

Defendant and Appellant.

G045594

(Super. Ct. No. 09CF2834)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Billy Jhonathan Ruiz of the following: two counts of kidnapping (Pen. Code, § 207, subd. (a));¹ two counts of second degree robbery (§§ 211, 212.5, subd. (c)); two counts of assault with a firearm (§ 245, subd. (a)(2)); one count of making a criminal threat (§ 422); and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)).² The jury found to be true allegations that: as to counts 1 through 4, defendant personally used and personally discharged a firearm (§ 12022.53, subds. (b) & (c)); and as to counts 5, 6, and 7, defendant personally used a firearm (§ 12022.5, subd. (a)).³ The trial court sentenced defendant to 25 years and eight months in prison.

Defendant argues on appeal that the court improperly instructed the jury by failing sua sponte to provide an accident instruction (CALCRIM No. 3404) with regard to defendant's discharge of a firearm enhancement. Defendant also argues the court erred by instructing the jury that the defense of voluntary intoxication (CALCRIM No. 3426) does not apply to a personal and intentional discharge of a firearm enhancement (§ 12022.53, subd. (c)). Because we conclude the court did not commit error, we affirm.

¹ All statutory references are to the Penal Code.

² Effective January 1, 2012, the statute defining the firearm offense charged against defendant has been repealed and reenacted without substantive change, but with a different statutory designation as follows: former section 12021, subdivision (a)(1) is now section 29800, subdivision (a)(1).

³ The jury acquitted the defendant of a count of street terrorism (§ 186.22, subd. (a)) and found not true street gang enhancements (§ 186.22, subd. (b)(1)) alleged with regard to most of the substantive counts of which he was convicted.

FACTS

In November 2009, defendant lived in Santa Ana with his stepfather Raul Avitia, his mother Maria Avitia, his girlfriend Misty, and another unrelated female named Rebecca. On November 17, 2009, Raul picked Misty up from work at the request of defendant. On the way home, Raul also picked up defendant. Defendant had a gun in his hand. Defendant said that Rebecca had told him Raul and Misty were having sexual relations. Defendant demanded that Raul tell him the truth. Defendant was upset. Raul thought defendant was under the influence of drugs. Defendant asked for Raul's telephone and Raul gave it to defendant. Defendant took Misty's cell phone and purse. As Raul drove, defendant pointed the gun at Raul's head.

Raul drove until he parked in the lot of a discount department store. Raul tried to explain to defendant that defendant was under the influence of drugs and was being told lies. Misty told defendant that she loved him. At some point, defendant's gun fired. The bullet went through the middle portion of the windshield. A piece of glass hit Raul in the face, causing him to bleed. Raul does not think defendant discharged the gun intentionally. Defendant did not apologize for shooting the gun and continued to point the gun at Raul and Misty. Later, defendant threatened to kill both Raul and Misty slowly, after having forced Misty to pull down her pants so defendant could try to determine whether she had recently had sex with Raul.

Raul eventually drove the vehicle home and parked in the driveway. All three individuals eventually walked inside the house. Maria and Rebecca were inside the house. Defendant still had the gun. Defendant ordered Maria to go to her room. Maria called the police while she was in her room. On the 911 call, Maria stated: "My son has a gun and is pointing it at my husband and other people here at my house." Rebecca repeated her allegation that Raul and Misty had a sexual relationship. Defendant

continued to demand that Raul and Misty tell him the truth. Defendant kicked Misty in the face.

When the police arrived, defendant told everyone to go outside the house. Defendant was arrested and found to possess three cell phones and two credit cards belonging to Misty.

DISCUSSION

Both of defendant's arguments on appeal pertain solely to the jury's enhancement findings that defendant "personally and *intentionally* discharge[d] a firearm" in the course of kidnapping and robbing his victims. (§ 12022.53, subd. (c), italics added; see CALCRIM No. 3148.) Defendant maintains (as he did at trial) that the discharge of the firearm was not intentional. Defendant claims on appeal that the court prejudicially erred by improperly instructing the jury on this point.

Sua Sponte Instruction on Accident

Defendant first contends that the court should have instructed the jury, sua sponte, on the defense of accident with regard to the discharge of defendant's firearm during the kidnapping of victims Raul and Misty.

"All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five — Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." (§ 26.) "The defense appears in CALCRIM No. 3404, which explains a defendant is not guilty of a charged crime if he or she acted 'without the intent required for that crime, but acted instead accidentally.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 996 (*Anderson*).)

“That the law recognizes a defense of accident does not, however, establish that trial courts have a duty to instruct on accident *sua sponte*.” (*Anderson, supra*, 51 Cal.4th at p. 996.) ““In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case.”” (*Ibid.*) The court’s duty extends to defenses that are supported by substantial evidence. (*Ibid.*; see, e.g., *People v. Barraza* (1979) 23 Cal.3d 675, 691 [entrapment defense].) “But ““when a defendant presents evidence to attempt to negate or rebut the prosecution’s proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a ‘pinpoint’ instruction relating such evidence to the elements of the offense and to the jury’s duty to acquit if the evidence produces a reasonable doubt, such ‘pinpoint’ instructions are not required to be given *sua sponte* and must be given only upon request.””” (*Anderson*, at pp. 996-997.)

Because the so-called defense of accident usually amounts to a mere restatement of the mental state element of a criminal offense, “[a] trial court’s responsibility to instruct on accident . . . generally extends no further than the obligation to provide, *upon request*, a pinpoint instruction relating the evidence to the mental element required for the charged crime.” (*Anderson, supra*, 51 Cal.4th at p. 997; see also *People v. Jennings* (2010) 50 Cal.4th 616, 674 [“A claim of accident in response to a charge of murder . . . is not an affirmative defense that can trigger a duty to instruct on the court’s own motion”].) Evidence in this case suggesting that defendant’s discharge of the firearm may have been accidental rather than intentional was already addressed by the jury instructions. CALCRIM No. 3148, as provided to the jury in this case, stated in relevant part that to prove “defendant personally and intentionally discharged a firearm,” the People were required to prove that “defendant intended to discharge the firearm.” The court was under no *sua sponte* obligation to instruct the jury with a “pinpoint”

accident instruction, relating the particular evidence suggesting the discharge may have been an accident to the mental state element of section 12022.53, subdivision (c).

Defendant concedes this analysis is correct, but claims *Anderson, supra*, 51 Cal.4th 989, should not be applied to the case at hand because the jury in this case was instructed prior to the announcement of the decision in *Anderson*. *Anderson* disapproved certain appellate cases (*People v. Gonzales* (1999) 74 Cal.App.4th 382; *People v. Jones* (1991) 234 Cal.App.3d 1303) “to the extent they hold a sua sponte instruction on accident is required when the defense is raised to negate the intent or mental element of the charged crime.” (*Anderson, supra*, 51 Cal.4th at p. 998, fn. 3.) According to defendant, it would be “fundamentally unfair” to apply *Anderson* “retroactively” to this case because the trial court erred under the law in effect at the time of trial.

We reject defendant’s argument. For one, it is not clear that *Anderson, supra*, 51 Cal.4th 989, announced a new rule rather than clarifying the law. (See *Jennings, supra*, 50 Cal.4th at p. 674 [no sua sponte obligation to instruct on accident in murder cases]; *People v. Lara* (1996) 44 Cal.App.4th 102, 110 [“The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime”].) Second, one implication of the analysis in *Anderson* is that the lack of an accident instruction in circumstances like those in the case before us is inherently not prejudicial, so long as the jury is instructed properly with regard to the elements of the offense at issue. A general instruction on the “defense” of accident — i.e., defendant was not guilty of the applicable firearm enhancement if he acted “without the intent required for that crime, but acted instead accidentally” (CALCRIM No. 3404) — would have been merely duplicative to the instruction that the jury was required to find that the discharge was “intentional.” Only a pinpoint instruction, relating the specific evidence in the case to the discharge of the firearm, could have possibly aided the jury’s understanding of the accident “defense” in this case. Given the lack of potential prejudice to a retroactive application of *Anderson*, we will apply the

“customary” rule that judicial case law is fully applicable to cases pending on appeal. (*People v. Birks* (1998) 19 Cal.4th 108, 136.)

Instruction with CALCRIM No. 3426

Defendant next asserts the court erred in its instruction of the jury with CALCRIM No. 3426.⁴ Defendant claims the enhancements for “personally and intentionally discharg[ing] a firearm” (§ 12022.53, subd. (c)) require specific intent, but the court did not include the enhancement in its list of specific intent counts for which voluntary intoxication could be considered. Thus, as to this enhancement, the jury should have been able to consider evidence of voluntary intoxication, which can negate specific intent. (§ 22, subd. (b).) No cases have specifically addressed this question.⁵

“‘The distinction between specific intent and general intent crimes evolved as a judicial response to the problem of the intoxicated offender’ and the availability of

⁴ CALCRIM No. 3426, as provided to the jury in this case, states in relevant part: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted in [certain specific intent counts]. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent. If the People have not met this burden, you must find the defendant not guilty of those crimes and enhancements. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to . . . personal use of a firearm alleged as an enhancement to Counts 1-4; personal discharge of a firearm as alleged as an enhancement in Counts 1-4; personal use of a firearm as alleged in counts 5-7.”

⁵ Cases cited by defendant in support of his argument have at most tangential bearing on the issue at hand. (See *People v. Treadway* (2010) 182 Cal.App.4th 562, 570-571 [prosecutor entered into improper plea bargains with codefendants in case involving mental state of individual discharging firearm]; *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993, 1006-1014 [habeas relief provided to petitioner because information only charged him with violating § 12022.53, subd. (b), which did not put him on notice of § 12022.53, subd. (d), enhancement for which he was tried].)

voluntary intoxication as a defense.” (*People v. Hering* (1999) 20 Cal.4th 440, 445.)

“When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.” (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.)

Defendant’s argument is not well taken. Section 12022.53, subdivision (c), provides for additional punishment of a defendant who “personally and intentionally discharges a firearm” while committing specified felonies. There is only general intent required to perform the act of discharging a firearm. The statute does not include “language typically denoting specific intent crimes, such as ‘with the intent’ or ‘for the purpose of.’” (*People v. Hering, supra*, 20 Cal.4th at p. 446.) For instance, section 12022.53, subdivision (c), does not state that the discharge of the firearm must be for the purpose of inflicting harm upon persons or property. Instead, read in context, the use of the word “intentionally” in section 12022.53, subdivision (c), suggests only that the statute is not designed to punish an accidental discharge of a firearm. (Cf. *In re Wasif M.* (2004) 119 Cal.App.4th 176, 181-182 [statute punishing those who “‘willfully’” commit a specified act was general intent crime].)

“[W]hen the Legislature intends to require proof of a specific intent in connection with a sentence enhancement provision, it has done so explicitly by referring to the required intent in the statute.” (*In re Tameka C.* (2000) 22 Cal.4th 190, 199 [rejecting claim that § 12022.5, subd. (a) enhancement for personal use of a firearm “in the commission of a felony” requires specific intent]; see also *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1493-1494 [court properly instructs the jury by deeming a firearm enhancement under § 12022.5, subd. (a), to be a general intent crime].) We conclude that the intentional discharge of a firearm pursuant to section 12022.53, subdivision (c),

requires proof of only general intent. Thus, the court properly instructed the jury in this case with regard to voluntary intoxication and the firearm enhancements pleaded and proved.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.